(4)

No. 04-674

Supreme Court, U.S.
FILED
JAN 31 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION, *et al.*,

Petitioners,

v.

BRYAN D. COLLINS, *et al.*
and JOHN W. STEWART, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

FULBRIGHT & JAWORSKI L.L.P.

BARCLAY MANLEY
1301 McKinney
Suite 5100
Houston, TX 77010

MARCY HOGAN GREER*
REBECCA EDGAR MELTON
600 Congress Avenue
Suite 2400
Austin, TX 78701
(512) 474-5201

PHELPS DUNBAR L.L.P.

JOHN P. MANARD, JR.
SESSIONS AULT HOOTSELL III
365 Canal Street
Suite 2000
New Orleans, LA 70130

ROSS F. BASS, JR.
111 E. Capital Street
Suite 600
Jackson, MS 39201

Counsel for Petitioners

* *Counsel of Record*

(Additional counsel listed on inside cover and signature pages)

192001

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Swift, Currie, McGhee & Hiers, LLP

M. Diane Owens
Bradley S. Wolff
1355 Peachtree Street
Suite 300
Atlanta, GA 30309

Butler, Snow, O'Mara, Stevens & Cannada

Lee Davis Thames
Donna Brown Jacobs
210 E. Capitol Street
Suite 1700
Jackson, MS 39201

Shook, Hardy & Bacon

Deborah A. Moeller
2555 Grand Boulevard
Kansas City, MO 64108

Baker Botts L.L.P.

Richard L. Josephson
Paul R. Elliott
Scott Janoe
910 Louisiana Street
One Shell Plaza
Houston, TX 77002-4995

Orrick, Herrington & Sutcliffe LLP

Daniel J. Thomasch
Richard W. Mark
Lauren J. Elliot
666 Fifth Avenue
New York, NY 10103

Thelen Reid & Priest, LLP

Gerald Zingone
701 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20004-2608

CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at pages *v-vi* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

Petitioners file this Reply to the Brief in Opposition submitted by Respondents (referenced in the Petition and below as "Plaintiffs").

A. The "Independent Question" Plaintiffs Suggest Is a Precursor to Review Is Irrelevant

Plaintiffs attempt to distract the Court from the serious and far-reaching jurisdictional questions presented in the Petition by claiming that a threshold inquiry must first be answered. According to Plaintiffs, the Court's resolution of this other subsidiary question—one not presented for review by Petitioners—might demonstrate that the questions that ***are*** presented are simply illusory here.

The "independent question" Plaintiffs describe actually consists of two distinct questions, neither of which requires the Court's attention before addressing the issues presented in the Petition. The first question is whether the Vaccine Act's "adulterant-contaminant" exception applies to thimerosal claims, which if answered in the affirmative would remove this case entirely from the purview of the Act. *See* 42 U.S.C. § 300aa-33(5) (defining "vaccine-related injury" as "an illness, injury condition, or death associated with one or more of the vaccines set forth in the Vaccine Injury Table, except that the term does not include [conditions] associated with an adulterant or contaminant intentionally added to such a vaccine."). The second is whether the manufacturers of thimerosal, the vaccine preservative at issue, are entitled to the protections of the Act.[1]

1. A Fifth Circuit decision subsequent to *Collins* addressed the scope of the Vaccine Act as to thimerosal defendants and was disclosed by Petitioners in a footnote to their Petition. *See Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004), cited in Petition at n.8.

In its decision, the Fifth Circuit assumed both the application of the Vaccine Act generally and its application to the thimerosal defendants specifically. *See* App. 4a-5a & n.1 (stating that "the remaining defenses apply equally to the claims asserted against the diverse and nondiverse defendants . . ."). Thus the questions presented for review have been defined by the court of appeals and are precisely positioned for this Court's consideration. The notion that any particular issue must be ruled upon by this Court before reaching the question of broad jurisprudential application is simply incorrect: "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions. . . ." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

Further, if Plaintiffs believe there is a legitimate question presented as to whether the Vaccine Act applies to thimerosal claims, ***they*** should have raised it in a conditional cross-petition. Presumably, they did not because the question has been settled against them by every court to have considered the issue. *See, e.g., Moss v. Merck & Co.*, 381 F.3d 501, 504 (5th Cir. 2004) (observing the "unremarkable proposition that a Thimerosal-related injury, occurring as a result of the administration of a vaccine, is a vaccine-related injury within the meaning of the Vaccine Act").[2]

---

2. There is simply no question that thimerosal, as a "constituent material" of vaccines which "maintain[s] [their] safety, purity and potency," is the very opposite of an "adulterant or contaminant," and that injuries cannot be "thimerosal related" without being "vaccine-related" as well. *See Owens v. Am. Home Prods. Corp.*, 203 F. Supp. 2d 748, 755-56 (S.D. Tex. 2002). Accordingly, every court, without exception, to have considered the issue has concluded, as a matter of law, that thimerosal is ***not*** an adulterant and that (Cont'd)

Plaintiffs raise these subsidiary issues under the Vaccine Act in order to paint the questions presented as limited by the specific facts of this case. *See* Brief in Opposition, p. 5 ("Neither *Collins* nor *Smallwood* decided or even considered how this analysis would apply in a case where the basis for dismissal of the non-diverse defendants applies to some but not all of the diverse defendants."). But in doing so they make precisely the central point Petitioners sought to show the Court with their Petition: The Fifth Circuit has created a rule with application far beyond the borders of this case, without adequately contemplating its unjustified consequences on federal jurisdictional jurisprudence.

(Cont'd)

thimerosal-related injury claims must first be pursued in the Vaccine Court. *See Owens v. Am. Home Prods. Corp.*, 203 F. Supp. 2d 748, 756 (S.D. Tex. 2002); *Blackmon v. Am. Home Prods. Corp.*, 267 F. Supp. 2d 667 (S.D. Tex. 2002); *Strauss v. Am. Home Prods. Corp*, 208 F. Supp. 2d 711 (S.D. Tex. 2002); *Liu v. Aventis Pasteur, Inc.*, 219 F. Supp. 2d 762 (W.D. Tex. 2002); *Wax v. Aventis Pasteur Inc.*, No. CV 02-2018 (E.D.N.Y. Oct. 28, 2002), as clarified by Order dated Dec. 16, 2002, 240 F. Supp. 2d 191 (E.D.N.Y. 2002); *Murphy (Joshua) v. Aventis Pasteur, Inc.*, 270 F. Supp. 2d 1368 (N.D. Ga. 2003); *Laughter v. Aventis Pasteur Inc.*, 291 F. Supp. 2d 406 (M.D.N.C. 2003); *Cheskiewicz v. Aventis Pasteur, Inc.*, 843 A.2d 1258 (Pa. Super. Ct. 2004); *Ashton v. Aventis Pasteur, Inc.*, 851 A.2d 908 (Pa. Super. Ct. 2004). To date, some seventy-four additional unpublished decisions exist with the identical holding.

B. Plaintiffs Cannot Deny That the Same Issues Have Been Presented and Resolved Differently in Cases From Multiple Circuits

Plaintiffs claim that the Fifth Circuit's conflict with the *Ritchey* decision is a "manufactured" one, despite the fact that *Ritchey* also construes *Cockrell* and plainly finds that the common defense theory should only be applied in the merits context and not a procedural one, a direct conflict with the facts of this case. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). Further, even the *Smallwood* decision itself acknowledged that *Ritchey* was at odds with its decision. *Smallwood v. Ill. Cent. R. Co.*, 385 F.3d 568, 575 n.21 (5th Cir. 2004). Plaintiffs nevertheless struggle to downplay this conflict, pointing to the fact that the plaintiffs in *Ritchey* did not raise the common defense theory in their briefing (without noting that Plaintiffs themselves failed to make any such challenge below). Ultimately the point is irrelevant, given that matters of subject matter jurisdiction cannot be waived and can and must be raised *sua sponte* by the federal courts.[3] *See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level.").[4]

---

3. Plaintiffs similarly question the existence of the implied split created by *LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680 (7th Cir. 1998), again ignoring the fact that a court has no choice but to consider matters of subject matter jurisdiction even when they are not raised or briefed by the parties.

4. Even were the Court to find that the split among the circuits was less than obvious at the time this case was decided, the Fifth Circuit's subsequent decision in *Rainwater v. Lamar Life Ins. Co.*, 391 F.3d 636 (5th Cir. Nov. 16, 2004), a statute of limitations case like *Ritchey*, plainly demonstrates that the Fifth Circuit's view of the common defense rule is squarely at odds with *Ritchey*.

C. This Case Presents More Than Mere Error Correction

This case presents a clear demonstration of jurisdictional vagaries and incongruent results spawned by the common defense rule as announced in *Smallwood* and further defined in this case. In the questions presented, Petitioners are not merely seeking a "correction" of the decision of the Fifth Circuit or its application of its own precedent. Rather, this matter illustrates the potential for extensive and unjustifiable application of an ill-considered federal jurisdictional rule to deny a federal forum to improperly joined defendants in myriad cases. Weighty issues of federal procedure and diversity jurisdiction are implicated by the decisions of the Courts of Appeals on this subject, and they deserve review by this Court.

CONCLUSION

For the reasons already stated in the Petition and those above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

BARCLAY MANLEY
1301 McKinney, Suite 5100
Houston, Texas 77010
(713) 651-5151

MARCY HOGAN GREER
Counsel of Record
REBECCA EDGAR MELTON
600 Congress Ave., Suite 2400
Austin, Texas 78701
(512) 474-5201

PHELPS DUNBAR L.L.P.

JOHN P. MANARD, JR.
SESSIONS AULT HOOTSELL III
Canal Place
365 Canal Street, Suite 2000
New Orleans, LA 70130
(504) 566-1311

ROSS F. BASS, JR.
111 E. CAPITAL STREET, SUITE 600
JACKSON, MS 39201
(601) 352-2300

Counsel for Petitioners
SmithKline Beecham Corporation
d/b/a GlaxoSmithKline

SWIFT, CURRIE, MCGHEE & HIERS, LLP

M. DIANE OWENS
BRADLEY S. WOLFF
1355 Peachtree Street, Suite 300
Atlanta, Georgia 30309
(404) 874-8800

BRUNINI, GRATHAM, GROWER & HEWES

ROBERT L. GIBBS
RICHARD LEE JONES
248 E. Capitol Street, Suite 1400
Trustmark Bank Building
Jackson, Mississippi 39201
(601) 948-3101

Counsel for Petitioner
Aventis Pasteur Inc.

BAKER BOTTS L.L.P.

RICHARD L. JOSEPHSON
PAUL R. ELLIOTT
SCOTT JANOE
910 Louisiana Street
One Shell Plaza
Houston, Texas 77002-4995
(713) 229-1234

WISE, CARTER, CHILD & CARAWAY

GEORGE Q. EVANS
EUGENE RANDOLPH NAYLOR
GAYE NELL CURRIE
401 E. Capitol Street
Heritage Building, Suite 600
Jackson, Mississippi 39201
(601) 968-5500

Counsel for Petitioner Abbott Laboratories, Inc.

ORRICK, HERRINGTON & SUTCLIFFE LLP

DANIEL J. THOMASCH
RICHARD W. MARK
LAUREN J. ELLIOT
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

BUTLER, SNOW, O'MARA, STEVENS & CANNADA

CHRISTY D. JONES
ANITA K. MODAK-TRURAN
210 E. Capitol Street
AmSouth Building
Jackson, Mississippi 39201
(601) 985-5711

Counsel for Petitioner Wyeth f/k/a American Home Products Corporation, s/h/a Wyeth Laboratories; Wyeth-Ayerst, Wyeth-Ayerst Laboratories; Wyeth Lederle, Wyeth Lederle Vaccines, and Lederle Laboratories

Butler, Snow, O'Mara, Stevens & Cannada

Lee Davis Thames
Donna Brown Jacobs
210 E. Capitol Street,
Suite 1700
Jackson, Mississippi 39201
(601) 985-5711

Counsel for Petitioner
Baxter International, Inc.

Watkins & Eager

William F. Goodman, III
Mildred M. Morris
400 E. Capitol Street, Suite 300
The Emporium Building
Jackson, Mississippi 39201
(601) 948-6470

Counsel for Petitioner
Merck & Co., Inc.

THELEN REID & PRIEST, LLP

GERALD ZINGONE
701 Pennsylvania Ave., N.W.
Suite 800
Washington DC 20004-2608
(202) 508-4332

COPELAND, COOK, TAYLOR & BUSH
JOSEPH LERAY MCNAMARA
J. MICHAEL COLEMAN
REBECCA BLUNDEN
Post Office Box 6020
Ridgeland, Mississippi 39158-6020
(601) 856-7200

Counsel for Petitioner
BioPort Corporation, Inc.

SHOOK, HARDY & BACON

DEBORAH A. MOELLER
2555 Grand Boulevard
Kansas City, Missouri 64108
(816) 474-6550

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.

WALKER W. JONES III
MARK C. CARROLL
4268 I-55 North
Meadowbrook Office Park
Jackson, Mississippi 39211
(601) 948-8000

Counsel for Petitioner
Eli Lilly and Company